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Before the
Federal Communications Commission
Washington, DC

In Re:

Jerry Szoka,
Cleveland, Ohio

Order to Show Cause Why a Cease
and Desist Order Should Not Issue

CIB Docket No. 98-48

To: Joseph Chachkin
Chief Administrative Law Judge

Opposition to Motion for Summary Decision

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I. Introduction.

Jerry Szoka (Szoka) started Grid Radio (GR) in September, 1995. GR operates a microbroadcast station on 96.9 Mhz. in Cleveland and serves the public interest by providing information and entertainment to a niche audience previously unserved by the "full power" FM stations assigned to the market by the Commission. GR provides this vital service without support from commercial advertising and without interference to licensed stations or other services.

Szoka now stands accused of the "crime" of serving his audience without obtaining prior permission from the federal government in the form of a license or other authority issued by the Commission. On April 2, 1998, the Commission issued an order to show cause why a cease and desist order should not be issued against Szoka barring him from further unlicensed broadcasts, and proposing a forfeiture of $11,000. On June 10, the CIB filed a Motion for Summary Decision. For the reasons set forth below, Szoka hereby opposes that motion pursuant to § 1.251(b). Material disputed issues of fact and law preclude summary decision.

II. Summary of Argument

Szoka is under no duty to comply with the FCC statute at issue here because the FCC has taken away his means of compliance in violation of the authorizing statutes and the US Constitution.

The law requires the FCC to encourage a diversity of expressed ideas and diverse speakers in regulating the electromagnetic spectrum. Ultimately, the public interest and its right to hear diverse programming from a variety of sources is the final arbiter of FCC authority over the FM band. Current regulations of Class D do none of these things; in fact, they are counter-intuitive and irrational. While they were initially justified as reducing interference, interference is no respecter of program content. By allowing identical or increased wattages, facilities, and transmission rights by translating stations, which obtain their programs from larger, distant stations, the FCC's rules themselves reveal greater opportunities for Class D licensing. By allowing older Class D's to upgrade and move into the commercial FM spectrum, while at the same time allowing the "drop-in" of more, shorter-spaced FM stations, the FCC throughout the 1980s has showed that spectrum scarcity and interference alone cannot be the reasons for disallowing Class D stations. Instead, by preferring more "professional" noncommercial, educational stations, a judgment about content has been made by the FCC, which goes beyond its statutory mandate. The public continues to demand that the FCC fulfill its statutory duty and allow small, community radio. In the meanwhile, the arbitrary prohibition on Class D stations is illegal and of no force.

III. Factual Background.

Jerry Szoka (Szoka) founded Grid Radio (GR) in September, 1995 because the existing stations serving the Cleveland market were not adequately serving the entertainment and information needs of his niche audience of gay men and women. GR's unique radio format has served the public interest and dramatically improved the lives of his listeners. Szoka Declaration at ¶ 29 & Ex. B (collecting listener comments regarding the need for and value to the community of GR). He chose an empty frequency, 96.9 Mhz., and a power output, 48.8 watts ERP, and antenna height, 80 feet HAAT, that would not cause harmful interference, while at the same time were sufficient to serve his audience with a quality signal. *Id.* at ¶ 21 & Ex. A. Szoka carefully considered applying for an FCC license, but did not do so because the regulatory regime imposed by the FCC, including the channel allocations, minimum power requirements, and financial qualifications, imposed an impenetrable economic barrier. Szoka sought both to serve his audience, ignored by the existing licensees, and demonstrate to the FCC the necessity, utility, and efficiency of microbroadcasting. Id. at ¶¶ 19-20, 22.

GR now broadcasts seven days a week, from 4 pm. to 3 am. Monday through Friday, with broadcasts beginning at 1 pm. on weekends. Id. at ¶ 3. None of the 16 FM stations heard in the Cleveland market serves the distinct programming needs of GR's audience. Id. at ¶ 4. GR's format is entirely non-commercial. The station is supported through donations and a volunteer staff. Id. at 10. News and information are provided primarily through a 3-hour weekly program called "The Beat Boys." This program provides news and interviews pertinent to the gay community, and routinely deals with issues such as gay marriage, hate

crimes, local artistic and entertainment events,fundraising events, and interviews. Id. at ¶ 5. GR also has a community bulletin board and makes routine public service announcements (e.g. AIDS awareness and testing, safe sex, and housing issues) and provides information on counseling services (critically important to teens who have questions and concerns about their emergent sexuality and may be considering suicide). Id. at ¶¶ 7, 8.

GR entertains its audience with a format of club-oriented dance music, which is also unavailable elsewhere in the market. Id. at ¶¶ 9, 11-14. Perhaps GR's most important public interest benefit is intangible, and can never be measured by counting hours of operation, ASCAP revenues, the percentage of time devoted to news and public affairs, ratings, or a comparison of formats–the sense of community, participation, and empowerment it helps to create for its audience:

> More generally, Grid Radio helps to facilitate a sense of "community" among its audience. When people have something in common, it brings them together. That feeling of bonding, that feeling of connection, or linkage is what Grid Radio does for the gay community. We provide a sense of empowerment and strength to a voice that would otherwise but stifled, and we do it in a manor that is inclusive to all people. We don't disparage, say, straight people, or any other group or community for that matter. We promote tolerance on all levels.

Id. at ¶ 6.

The FCC has not alleged that GR is causing any harmful interference with other licensees or services. Nor has the FCC alleged that GR has or is posing any threat to public health and safety. GR's $4,000 worth of equipment was designed, selected, and installed to meet or exceed the technical standards of equivalent "type approved" equipment. There is no allegation of any failure by GR to adhere to technical standards. Id. at ¶¶ 15-18. GR has

broadcast in a way that is not a nuisance to other stations. As a licensed electrician and former technical adviser at a college radio station, Szoka is not an irresponsible "pirate" or worse. Id. at ¶¶ 15, 17. Rather, he has confined his signal within the limits recognized by other broadcasters, making every effort to avoid interference with other broadcasters and services. Because GR's signal is comparatively weak, and the FCC has allocated all frequencies in the Cleveland area on the basis of Class B stations, 47 CFR § 73.202, it has not been difficult for GR's small station to fit on an unused portion of the spectrum.

IV. The FCC Banned But is Now Reconsidering Whether to License Microbroadcasters Such as Szoka.

The federal government has chosen the speakers allowed to broadcast their messages in the radio spectrum. The number of these speakers granted licenses has been carefully limited through a complex system of laws and regulations. These limitations have been and continue to be entirely imposed by governmental choice rather than any intrinsic limitations dictated by the technology or the spectrum resource itself.

The CIB has charged Szoka with violating 47 U.S.C. § 301, which prohibits the operation of a radio station without a license. Szoka operates a low-powered, "micro" radio station of approximately 48.8 watts ERP in Cleveland, Ohio at 96.9 mhz. The Commission's regulations prohibit the licensing of any new radio station that operates with a minimum effective radiated power of less than 100 watts anywhere in the United States except Alaska. *See, e.g.*, 47 C.F.R. § 73.512(c) (except in the state of Alaska, the FCC will not accept new applications for licenses from Class D Stations, defined to include stations operating with less than 100 watts); 47 C.F.R. § 73.211(a) (FM stations must operate with a minimum effective

radiated power of 100 watts); 47 C.F.R. § 73.511(a) (no new noncommercial Educational station will be authorized with less than the minimum power requirement for Class A Stations [100 watts]).

The FCC is presently undertaking a public inquiry into the need for, technical feasibility of, and implementing rules for a new FM microbroadcasting service. RM 9208, 9242. A number of technical and policy considerations have fueled this inquiry. First and foremost, there is a considerable amount of spectrum resource within the FM broadcast service that has been deliberately left vacant that could be used by microbroadcasters in both urban and rural communities. Second, rapid consolidation of ownership has taken place following the sweeping changes implemented by the Telecommunications Act of 1996.[1] That statute allowed up to eight stations to be owned by a single entity in a market and removed all restrictions on the total number of licenses that could be held by a single entity.[2] The

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1 Even Chairman Kennard has recognized the threat that the resulting reduced number of voices poses to the values protected by the First Amendment and the FCC's affirmative duties under the Communications Act. In the April 6, 1998 issue of Broadcasting & Cable, "___", Kennard was quoted as saying that he is "concerned about ensuring that there are opportunities for people to participate in the broadcast community...It troubles me that there are fewer opportunities to do that today, but we know that there are many, many people, who still want to speak to their communities over the airwaves. And these are not just minority-owned businesses. These are community groups, churches, small businesses and people who want to have use of the public airwaves." Kennard also stated, "I really fear the day when we have a world in which people in any community get all of their news and information, local news and information, from only one or two sources over the air. I think that's a threat to the democratic process."

2 Section 202(a) "National Radio Station Ownership Rule Changes Required: The Commission shall modify section 73.3555 of its regulations (47 C.F.R. 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally."

increased concentration has reduced the number of independent voices, and tended to standardize formats and reduce the amount of truly locally oriented content. Third, the observed market demand by as many as several thousand "pirate" stations demonstrates that there is a growing unmet need for community-based radio. Fourth, improvements in transmitter and receiver technology during the past two decades can facilitate the more efficient use of the spectrum. Even the Commission has recognized that there is now less of a need for separation on second and third adjacent channels as a protection against harmful interference.[3]

Szoka is under no duty to comply with these regulations because they are in conflict with the statutes governing the Commission and they violate the First Amendment.

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3 Szoka commissioned a study by Doug Vernier that found the closest station to be in the distant Akron market. The closest was 2 channels away --WKDD at 96.5 -- for which interference could be predicted using FCC criteria in a radius of 1.5 km. The second was two co-channels away -- WONEFM at 97.5 -- and the only interference which could be predicted for it was in a 500 meter radius, which contained no permanent residents. Vernier Study, Szoka Dcl. at Ex. A. These numbers should be put into perspective. Recent rulings on "grandfathered" stations that exceed ordinary spacing requirements have found that these theoretical predictions of interference are probably too high when the capabilities of modern receivers and transmitters are considered. See Report and Order, MM Docket No. 96-120, RM - 7651 (Aug. 4, 1997) (short-spaced stations seldom affected by second and third adjacent channel interference; small risk "is far outweighed by the improvement in flexibility and improved service).

V. The Commission's Refusal to License Microbroadcasters Violates the Communications Act of 1934.

A. Congress Imposed a Duty on the Commission to Facilitate Broadcast Speech and Maximize the Number of Speakers.

Congress passed the Communications Act of 1934 to secure the benefits of newly developing technologies. Several provisions of the Act impose an affirmative duty on the Commission to facilitate speech and maximize the number of speakers in pursuit of the public interest mandate. See 47 U.S.C. § 303(g)(FCC required to "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest"); 47 U.S.C. § 303(y) (authority to allocate spectrum "to provide flexibility of use" consistent with treaties, in the public interest, and without "harmful interference among users"); 47 U.S.C.§ 157(a)("It shall be the policy of the United States to encourage the provision of new technologies and services to the public"); 47 U.S.C. § 307(b)("the Commission shall make such distribution of licenses, frequencies, hours or operation, and of power among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same.")(emphasis added) 47 U.S.C. § 151 (FCC shall regulate "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges"); 47 U.S.C. § 326 (Commission has no "power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication"); see also § 257(b), Telecommunications Act of 1996 ("National Policy: In

carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity."). Generally this obligation requires maximizing the number of users on the electromagnetic spectrum and reducing gaps in coverage. It is axiomatic that the "public interest" standard cannot repeal or curtail the First Amendment rights of either the public or broadcasters, and that any regulation of broadcasting must recognize that the interest of the listening public is paramount. In *Columbia Broadcasting System, Inc. v. Democratic Nat. Committee*, 412 U.S. 94 (1973), for example, the Court upheld the FCC's decision not to force broadcasters to accept paid editorial advertising. Noting that the "public interest" standard must be construed with due regard to the First Amendment interests of the public, the Court recognized that such a requirement would relegate the airways to the wealthy:

> The Commission was justified in concluding that the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth.

Id. at 123. Regulations that are contrary to the Act, here the regulatory ban on microbroadcasting, cannot be enforced and must be set aside. *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (access obligation that treated CATV systems as common carriers held unlawful under Act).

Congress granted the Commission the power to issue licenses (and imposed the ban on unlicensed broadcasting) to benefit the public by ensuring interference-free access to the public. The licensing power has never been construed to authorize the denial of license to new speakers -- here microbroadcasters such as Szoka who can speak without causing harmful

interference -- primarily on the basis of protecting the economic interests of existing licensees. The power to license, thus carefully circumscribed to conform to the mandate of Congress and the First Amendment, was described by the Court in the first case construing the Act as follows:

> The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.
>
> In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.
>
> An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, inter alia, into an applicant's financial qualifications to operate the proposed station.
>
> But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

> The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.
>
> Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.
>
> This is not to say that the question of competition between a proposed station and one operating under an [309 U.S. 476] existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations,--the existing and the proposed--will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. These matters, however, are distinct from the consideration that, if a license be granted, competition between the licensee and any other existing station may cause economic loss to the latter. If such economic loss were a valid reason for refusing a license this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act itself expressly negatives, which Congress would not have contemplated without granting the Commission powers of control over the rates, programs, and other activities of the business of broadcasting.
>
> We conclude that economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license.

F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470, 474-77 (1940) (footnotes omitted; emphasis added). The D.C. Circuit articulated the Commissions's affirmative statutory obligation to license a new non-interfering service, in that case a "booster" to serve an area blanketed by adjacent mountains, in *C.J. Community Services v. FCC*, 246 F.2d 660, 662-664 (D.C. Cir. 1957). The Court explained:

We think there is an alternative [to a cease and desist order banning further operation of the unlicensed television booster]. The Commission's Decision [overturning the ALJ] noted that 'The Rules and Standards do not now provide for the licensed operation of such an installation.' Thus, despite the Commission's clear duty to 'provide for the use of such channels,' throughout the past 22 years of the Commission's life it has failed to adopt rules under which signals from station KXLY-TV and KHQ-TV, useless in Bridgeport without the booster, may be picked up, reinvigorated and made available to the residents of the town. We suggest, therefore, that the Commission may well get on with the rule-making proceedings apparently contemplated in its Docket 11331 and in its Docket 11611 in which is to be examined the feasibility of 'booster,' or translator stations, or possibly other devices, as a means of filling the service area of television stations.

Certainly, when a violation of the Act has been shown, the Commission may revoke a station license, but, under § 312(b), it also may impose a lesser sanction. It may issue a cease and desist order. By the same token, under § 312(c) the Commission may consider grounds offered by a 'person involved' in a § 312(b) complaint as to 'why * * * a cease and desist order should not be issued.' Clearly the Commission must weigh the circumstances, for Congress says that the cease and desist 'shall' be issued only if it be decided that the order 'should issue.' Congress knew very well what it was saying. It surely knows the difference between 'should' and 'shall.'

Here the Commission reversed the Examiner's conclusion that the cease and desist order 'should' not issue. It is clear that the Commission decided it had no discretion [not to issue a cease and desist order], once it found a violation to exist. It even so argued. Therein lies its error. Within the scope of our review under § 402(g) of the Act, 47 U.S.C.A. § 402(g) and § 10 of the Administrative Procedure Act, it is our duty, inter alia, to decide all relevant questions of law and to interpret statutory provisions. We will not determine that the agency rule-making action has been unreasonably delayed or that its instant action was arbitrary. We say only that, short of the appellant's statutory right, the Commission acted mistakenly in its belief that it lacked discretion to withhold the issuance of a cease and desist order, and upon this point the Commission's order must be reversed.

As we remand the case, we observe that the Commission itself may conclude that it is manifestly inequitable that the appellant be subject to a cease and desist order when the Commission has failed to provide an administrative mechanism through which a license may be procured. We have no doubt that the Commission Will consider the problem in the light of the well known standard of 'public convenience, interest, or necessity.' We do not undertake to invade the administrative province. Rather, it is our desire to adjust relief 'to

> the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,-- to secure a just result with a minimum of technical requirements.'
>
> Had the Commission's jurisdiction been clear from the outset, we have no doubt the appellant would long since have applied for an STA pending completion of the rule-making proceedings. We think it should now have that opportunity, especially since so much of the record involved as the major issue, the applicability of § 301. We assume the appellant will file its application with reasonable promptitude.
>
> If after consideration of appellant's application, the Commission finds itself unable to authorize the issuance of an STA, the Commission may reopen the 'show cause' proceedings. Now assured that it has discretion which may be exercised under § 312(c), it is to be expected that the Commission will conform its action to the provisions of § 312 so far as applicable.

Id. at 363-65 (footnotes omitted; emphasis added). *See also, e.g., FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (upholding ban on broadcast-newspaper cross-ownership because diversification of media voices was object of both Act and First Amendment).

Unlike other agencies whose purpose is simply to eliminate certain harms in a reasonable manner, e.g., the EPA, the FCC has an affirmative mandate to maximize use of the spectrum resource, that is, to eliminate gaps and waste in the usage of the electromagnetic spectrum while eliminating or avoiding unacceptable interference and guaranteeing diverse programming. *See, e.g., Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 274 (D.C. Cir. 1973) (statutory maximum use requirement is related to First Amendment goal of a "diversity of ideas").

Furthermore, the FCC must be flexible and responsive in applying its rules, so that the public interest in a particular case is not undermined by a rigid adherence to preestablished rules and regulations. *See, e.g., WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (general rule may not be in "public interest" if extended to every case); *C.J. Community Services v. FCC*, 246 F.2d 660, 662-664 (D.C. Cir. 1957) (the Commission has discretion to withhold issuance of cease and desist order when in the public interest).

The FCC has assigned portions of the electromagnetic spectrum, specifically the bandwidth from 88 to 108 mhz., to the exclusive use of FM radio stations. 47 C.F.R. § 73. 201. But instead of maximizing the use of this precious resource, it has allowed gaps to remain in the spectrum, leaving various frequencies unused in many geographic areas during most or all of the day. *See, e.g.*, Dunifer Dcl. [Ex. A] at ¶¶ 6, 15; Radio World, August 10, 1994, p. 9, "Radio Translators Fill in Coverage Gaps"; 47 C.F.R. § 74.1201 *et seq.* (permitting low power transmitters to operate with less than 100 watts if they are transmitting a signal originating from a full-power radio station, but prohibiting local broadcasters from using a transmitter with identical wattage to broadcast any program originating in the listener's community); *cf.* 43 Fed. Reg. 39706 ("even if permitting many 10-watt operations was inefficient [because of interference with potential high-power stations], this did not necessarily mean that a given 10-watt operation was inefficient"); 43 Fed. Reg. 39708 ("there will be space in the commercial FM band to accommodate many of the 10-watt stations that will be required to change channels"); 43 Fed. Reg. 39707 ("there was something approaching general agreement that Class D's could be useful in small towns").

B. The Commission Has Banned Microbroadcasting Since 1978.

The FCC's ban on microbroadcasting has failed to serve the public interest and the FCC's affirmative statutory mandates by decreasing diversity and by wasting space in the FM spectrum. The Commission prohibited new Class D stations and attempted to eliminate most existing Class D stations in a 1978 Commission Report and Order (Docket 20735). The reasons are found in the FCC's 1978 Second Report and Order, entitled In the Matter of Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations, 43 Fed. Reg. 39704 (1978) ("Second Report and Order"). Prior to the Second Report and Order, Class D stations operated at 10 watts ERP, the lowest FM power licensed by the Commission. Class D licenses were available only for noncommercial educational operation, typically serving limited broadcast areas such as college campuses and local communities. The Commission banned new Class D applications (except for Alaska) and required existing Class D licensees to increase power to 100 watts. 47 C.F.R. § 73.512(c); *see also* FCC, Low Power Broadcast Radio Stations, <http://www.fcc.gov/mmb/asd/lowpwr.html (July 18, 1998) ("No new Class D FM stations will be authorized outside the state of Alaska").

Although 47 U.S.C. § 324 directs all broadcast stations to operate at the minimum power necessary, the Commission in its Second Report and Order raised the minimum effective radiated power of these Class D educational FM stations from 10 watts to 100 watts. The Commission cited three reasons for increasing the minimum ERP on these Class D stations: technical efficiency, wider coverage, and better quality service. Second Report and Order at 39705. Unfortunately, the implementation of the Second Report and Order completely failed adequately to accomplish any of these primary objectives. Note,

"Educational FM Radio -- The Failure of Reform," 34 Fed. Com. L.J. 432, 450-53 (1982) ("Educational FM Radio"); *see id.* at 465 ("The rule change not only failed to achieve its goals, but it dealt them setbacks, making them more difficult to achieve in the future."). For example, it aggravated spectrum scarcity in the commercial spectrum. *Id.* at 434 ("The rule change has increased the crowding of the spectrum and has done so without achieving any improvement in service to the public").

The methods employed by the Commission were irrational, based on faulty factfinding, and have failed to accomplish any of their goals. "The Commission itself remarked in the initial Notice of Proposed Rulemaking that it was arguable that abolishing 10-watt operations to create more room in the spectrum would be like banishing the oil from a sardine can because of an alleged lack of space." *Id.* at 455 n.123, *citing* 41 Fed. Reg. 16, 978 (1976). Why? Because according to the Commission's own antenna separation tables and interference prediction criteria, Class D stations create the least amount of interference. *See, e.g.*, 47 CFR § 73.207 (distance separation requirements from a Class D to any other station are the lowest; Class D to Class D are a mere 11 miles for co-channels), *available in*, 49 Fed. Reg. 10264 (Mar. 20, 1984). Basic high school geometry further illustrates the point. Within a given space (imagine a large circle) filling it with large shapes invariably leaves gaps, which can be filled by similar, smaller shapes. Two medium sized circles placed within a larger circle will leave more extensive gaps than the same two coupled with two smaller circles in the interstices, and so on. This commonsense observation matters in the regulation of radio waves for two reasons. First, radio waves will radiate in all directions equally (ignoring, for a moment environmental factors and directional antennas), creating a circular range of possible

reception. Educational FM Radio at 433. Second, the nexus between this fact and the goal of diversity is embodied in the law, which requires that "[i]n all circumstances, except in case of radio communications or signals relating to vessels in distress, all radio stations, including those owned and operated by the United States, shall use the minimum amount of power necessary to carry out the communication desired." 47 U.S.C. § 324. The Second Report and Order ignores this mandate, embodied in the Act, and substitutes a service comprised of large, professionalized stations.

Given the stated goal of wider coverage, the insubstantial power boost resulting from the low-power ban and the mandatory increase to a minimum power of 100 watts failed to justify the elimination of almost all 10 watt stations within the constitutional U.S. *See id.* at 433-34 n.12 (increasing power from 10 to 100 watts only increases the range by approximately 13 miles); *id.* at 461 ("This minimal increase [in power], while failing to substantially improve the coverage area of the educational stations, has made it less likely that there will be room for any new stations in the educational FM band."). At the same time, the blanket ban on new low-power licenses has prevented communities from obtaining service, even when in reality there is no scarcity of available spectrum. Dunifer Dcl. [Ex. A] at ¶ 6; "Low Power, High Hassle," Radio World (Aug. 20 1997) ("The legal limits of unlicensed operation are set too low. The radio band can accommodate more low-power operations than it does."), *available in,* <http://radio4all.org/news/rw.html; 43 Fed. Reg. at 39707 (general agreement that Class D's could be useful in small towns); 47 C.F.R. § 73.512 (new Class D's are still allowed to be issued in Alaska).

The Commission's assumption that higher-power stations make more efficient use of spectrum space than multiple low-power stations was not so much a technical judgment as a value judgment preferring larger, more sophisticated educational stations funded by the CPB to the less sophisticated, local, and more varied programming offered by the old Class D's. Second Report and Order, 43 Fed. Reg. 39707-39708; Charles Fairchild, "The FCC and Community Radio," Z Magazine (Jul. 1997), *available in,* <http://www.radio4all.org/fp/FCC.html> ("the NPR/NFCB alliance pushed for what they called the 'professionalization' of public and community radio").

The rule change instead had the effect of crowding the airwaves with overpowered community stations, while disallowing new Class D licenses as technology slowly made more frequencies available across the entire FM spectrum. Freezing this rule in place, born from the theory of increasing scarcity, as the FCC acknowledged the ability of more stations to fit on the FM band violated the FCC's statutory mandates outlined above.

Technological changes have undermined an important foundation of the Commission's decision to ban microbroadcasting. More stable and accurate transmitters and receivers have greatly reduced the potential for harmful interference especially on second adjacent channels. Szoka, May 27, 1998 Tr. at 10 ("Equipment's come a long ways since. . . 20, 30 years [ago]"). With relatively modest investment, individuals can now run microradio stations out of their own homes, without interference and with signal purity and stability meeting FCC standards, Dunifer Dcl. [Ex. A] at ¶ 19(d) (the most efficient use of the spectrum would be a combination of low-power and full-power stations), ¶ 17 ("Technology has changed radically since the FCC's 1978 rulemaking procedure which addressed the 100 watt minimum

requirement that is still in place today. It is now possible for individuals to operate low power stations with equipment that meets or exceeds FCC standards for stability and signal purity, and for those stations to operate within gaps on the spectrum that are required to separate full power stations, resulting in an overall more efficient spectrum"), ¶ 18(d)("the relevant technology has advanced incredibly in the nearly 20 years since those proceedings. For the first time, microbroadcasting is cheap enough for an individual of less than substantial means to go on the air from their garage or home. The equipment now available is capable of operating at or above FCC standards for signal purity and stability. Simply put, micro radio technology, as it exists today, was not remotely considered by the FCC in the 1978 hearings").

Szoka's own station illustrates that there are gaps in the electromagnetic spectrum that could readily accommodate microbroadcasters. An April, 1998 frequency study by telecommunications engineer Doug Vernier showed negligible interference by Szoka's station with any other stations. *See* Szoka Dcl. at Ex A.

Free Radio Berkeley, which operated in the San Francisco Bay Area, was another example of a microradio station that fits a niche in the electromagnetic spectrum. Free Radio Berkeley neatly fit in the space left between full-power broadcasters in the San Francisco Bay Area -- space that cannot be used by larger broadcasters, and would thus otherwise be wasted. *See* Dunnifer Dcl. [Ex. A] at ¶ 15 ("The frequency used by Free Radio Berkeley is also assigned to a 50,000 watt station in Modesto. Due to the distance, a Oakland/Berkeley area does not fall within the primary service area of this station. A full power station could not be put on this frequency in San Francisco, due to possible interference with Modesto, however.

A micropower station fits into this pocket efficiently with no possibility of interfering with the primary service area of Modesto due to the low power and antenna."); *see also* Dunifer Dcl. [Ex. A] at ¶ 19(d)("in the Bay Area, no additional full power stations can be added, yet there are still approximately ten slots in between the existing stations that are suitable for microbroadcasters that would not cause interference with the licensed stations."). These cases are far from unique. Dunifer Dcl. [Ex. A] at ¶ 6 ("some stations exist in rural areas where there are virtually no other stations around and no conceivable concern about 'spectrum scarcity'"), ¶ 14 ("Because the FCC allows such high power levels, 30-50 times the signal strength needed by an average FM receiver in the primary service area, the FM spectrum in the major urban areas has no room left for additional full power stations, in spite of the fact that there are numerous unused channels. This creates pockets which can be filled by micropower FM stations."); ¶ 17 ("It is now possible for individuals to operate low power stations with equipment that meets or exceeds FCC standards for stability and signal purity, and for these stations to operate within gaps in the spectrum that are required to separate full power stations, resulting in an overall more efficient spectrum").

In the FM drop-in decisions following Docket 80-90, the FCC acknowledged that technology is allowing broadcasters using full power stations to use even more frequencies than previously thought available. FCC, Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, 48 Fed. Reg. 29486 (1983). This occurred a full five years after the original decision on Class D licenses. Therein, FCC computer studies found that the "availability of new FM stations could increase from 43% to 57% if reclassification [of existing stations] were considered" *Id.* at 29496.

This fact of increasing technological ability to transmit and receive purer radio signals has not been codified into Class D regulations, rendering them suspect as a lawful interpretation of the statute.[4]

Some broadcasting may best be performed using limited facilities. the Commission in its Second Report and Order cited opposing arguments that maintained:

> [l]imited power . . . is an appropriate way to reach a small community or neighborhood which is part of a larger city of license. According to [these commentators], operation on a greater scale with substantial facilities could even bring about a separation of the station from its more limited community and thereby cause a loss of effective station/ community dialogue and involvement.

Second Report and Order at 245. In fact some smaller stations that had argued to the Commission had two or three times the audience of a local 50 kw noncommercial station. *Id.* at 247; *see also*, Szoka, May 27, 1998 Tr. at 9 ("between the commercial stations and the licenses they issue for the very small wattage, there's a huge gap which can be filled"); Dunifer Dcl. [Ex. A] at ¶ 15 (while a full power station could not fit in the frequency of Radio Free Berkeley, a smaller station could without causing interference to the distant, larger station); 47 C.F.R. § 74.1201 *et seq.* (translator stations with less than 100 watts of power permitted in rural areas) . Because a micro radio station is in even closer proximity to the

4 This is especially true when the rules seem contrary to common sense and basic physics on their face. While other FCC rules might be entitled to greater deference, one that is contrary to other trends in FCC rulings, relies on shoddy factfinding, i.e., no computer studies, involves factual premises that violate other FCC rules and statutory mandates deserves very little.

local community, this provides a further guarantee that a dialogue with the community may emerge, providing greater expressive diversity, fulfilling the FCC's statutory mandate.

This counter-intuitive solution to the perceived problem of spectrum scarcity reveals that the Commission's ban on low-power (i.e.10 to 100 watt) FM stations was irrational and unreasonable given the overriding goals set forth in the Second Report and Order. The net effect of the Commission's policy was to further crowd the commercial spectrum with upgraded Class D stations, when its own report suggests the continued viability of numerous smaller stations in rural areas. So, instead of allowing smaller stations where they are appropriate -- niche markets and rural areas -- former Class D stations were forced to upgrade to serve their existing market, while at the same time the ban on new Class D's foreclosed the ability of others to serve emerging market with anything less than an expensive full-power station.

C. The Commission's Ban on Microbroadcasting is Unlawful As Applied to Szoka and Grid Radio.

The Second Report and Order reveals that the factfinding -- primarily petitions -- used to eliminate Class D's from the FM service was insufficiently cognizant of the Commission's various statutory obligations, *inter alia*, to maximize use of the spectrum, encourage the airing of diverse opinions, promote and the public interest. It can and should be revisited because the moribund factfinding upon which it was based undermines the Commission's statutory duty to maximize use of the spectrum in the public interest.

Because the FCC had, at a minimum, the duty to provide Jerry Szoka with some fair opportunity to obtain a waiver, the regulations which effectively barred his ability to obtain a

license shield him from liability for failure to do so. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157-1158 (D.C. Cir. 1979) (a waiver based on First Amendment considerations must be given more than "routine treatment"). "[W]hile a broadcasting station, as defined in the Act, which affects interstate communications clearly must be licensed, the Commission must make a provision for the issuance of an appropriate license." *C.J. Community Services v. FCC*, 246 F.2d 660, 663 (D.C. Cir. 1957).

VI. The FCC's Regulatory Prohibition on Low-Power FM Licenses Violates the First Amendment and is Null and Void.

A. Szoka has Standing to Challenge the Constitutionality of the Regulations at Issue.

There can be no doubt that Szoka has standing under Article III of the Constitution to challenge the forfeiture and cease and desist order sought by the CIB. He is aggrieved by the CIB's enforcement proceedings and has suffered from the trampling of his First Amendment rights. These injuries are traceable to the CIB's conduct, and the courts -- like this tribunal -- have authority to redress the grievances raised by the Szoka. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The courts have repeatedly recognized that being subject to forfeiture proceedings by the FCC gives one standing to challenge not just the statute pursuant to which a forfeiture was imposed, but also regulations of the Commission whose existence is indirectly linked to the proceedings against the defendant. *See Lutheran Church Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998). For example, a religious broadcaster had standing to challenge the FCC's affirmative action regulations after it was sanctioned for allegedly not being candid in its reporting about its hiring practices, since the aspect of its